Zawiyah bt Ahmad Adam v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO MT1–41–01 OF 2005
LOW HOP BING J
7 APRIL 2006

Criminal Procedure — Charge — Defective charge — Principles regulating drafting of charge — Accused charge as occupier found to have permitted an illegal immigrant to enter his premises — Whether charge defective — Whether challenge on charge ill founded — Criminal Procedure Code ss 152 & 153 — Immigration Act 1959/63 s 55E(1) & (2)

Criminal Procedure — Sentence — Appeal against sentence — Principles governing — Accused is a first offender — Whether there are aggravating circumstances resulting in offences which involve serious elements of criminality — Whether imposition of custodial sentence would not serve the public interest — Whether imposition of fine adequate to serve the ends of justice — Immigration Act 1959/63 s 55E(1) & (2)

Immigration — Employing illegal foreign worker — Whether accused an occupier — Whether accused permitted illegal immigrant to enter premises — Whether prima facie case established — Presumption under Immigration Act 1959/63 s 55E (1) — Whether rebutted by accused on a balance of probabilities — Whether prosecution has establish the case beyond reasonable doubt — Immigration Act 1959/63 s 55E(1) & (2)

The appellant-accused ('the accused') was charged as an occupier found to have permitted a female Indonesian illegal immigrant to enter his premises (stall) in contravention of s 55E(1) Immigration Act 1959/63 ('the Act') and punishable under s 55E(2) of the Act. This was an appeal by the accused against the decision of the learned magistrate ('the magistrate') who had convicted the accused of the offence under s 55E(1) of the Act and imposed a sentence of five days imprisonment in addition to a fine of RM8,000, in default five months imprisonment.

Held, allowing the appeal in part:

(1) Upon a proper perusal of the charge in question, the principles regulating the drafting of the charge under s 152 of the Criminal Procedure Code ('CPC') and the particulars required under s 153 of the CPC have been adhered to by the prosecution. Section 55E(3) and (5), cited for the defence provide respectively for a rebuttable presumption and the measures which may be taken by the defence to rebut the presumption. It was fundamental that presumptions and their rebuttals belong to the domain of evidence as opposed to procedure. The defence's challenge to the charge in question was ill-founded (see paras 11 & 12).

(2) The magistrate had arrived at the finding of facts after subjecting the prosecution evidence to a maximum evaluation. There was no error in the finding of fact that the accused was the 'occupier' in relation to the premises, being a person having charge, management or control of the premises. The word 'premises' includes, inter alia, (a) any land, building or part of a building; and (b) any place whether open or enclosed (see paras 29 & 30).

(3) The prosecution had proved that the female Indonesian immigrant had been found at the premises on the date and at the time in question, in which case, the presumption under s 55E (3) of the Act would arise and the accused being the occupier shall be presumed, unless the contrary is proved, to have permitted the illegal immigrant to enter the premises and had knowledge that she was an illegal immigrant (see para 31).

(4) While it is true that the female Indonesian has legally entered Malaysia, the entry was subject to the condition that she was to work as a domestic maid in Petaling Jaya but she had breached the condition by working at the premises. The Indonesian immigrant had been convicted in the magistrate's court of an offence in contravention of reg 39(b) of the Immigration Regulations 1963. Hence, there could be no doubt that in law and in fact the female Indonesian was at the material time an illegal immigrant (see para 32).

(5) The magistrate had adequately considered the defence case and had come to a correct decision in holding that the accused had not rebutted the presumption under s 55E(3) of the Act on a balance of probabilities and that the prosecution had established its case beyond reasonable doubt (see para 38).

(6) As the accused had no previous conviction and custodial sentence was not mandatory, in meting the proper sentence, the magistrate had to exercise the discretion judicially by reference to the facts and circumstances of each particular case and having due regard to established judicial principles. In the absence of aggravating circumstances resulting in offences which involve serious elements of criminality, first offenders are generally to be kept out of prison, rather than being given a 'short, sharp shock' in the form of a five-day custodial sentence. On the facts of this appeal, there was no evidence of serious elements of criminality to warrant the imposition of a custodial sentence. A term of five-day imprisonment for a statutory offence in the instant appeal would not serve the public interest, as the RM8,000 fine was adequate to serve the ends of justice (see paras 42 & 43).

[Bahasa Malaysia summary

Perayu-tertuduh ('tertuduh') telah dituduh sebagai penghuni yang didapati membenarkan seorang wanita Indonesia pendatang haram untuk memasuki premisnya (gerai) yang bertentangan s 55E(1) Akta Imigresen 1959/63 ('Akta tersebut') dan boleh dihukum di bawah s 55E(2) Akta tersebut. Ini merupakan rayuan oleh tertuduh terhadap keputusan majistret yang bijaksana ('majistret tersebut') yang telah menyabitkan tertuduh dengan kesalahan di bawah s 55E(1) Akta tersebut dan mengenakan hukuman lima hari penjara dan juga denda RM8,000, jika gagal lima bulan penjara.

Diputuskan, membenarkan rayuan sebahagiannya:

(1) Setelah meneliti pertuduhan yang dipersoalkan, prinsip-prinsip yang mengawal pembentukan pertuduhan di bawah s 152 Kanun Tatacara Jenayah ('KTJ') dan butir-butir yang diperlukan di bawah s 153 KTJ telah dimenuhi oleh pihak pendakwa. Seksyen 55E(1) dan (5), digunakan untuk pembelaan memperuntukkan satu andaian yang boleh dipatahkan dan langkah-langkah yang boleh diambil oleh pihak pembela untuk mematahkan andaian itu. Adalah penting agar andaian itu dan pematahannya terangkum dalam ketarangan dan bukan prosedur. Cabaran pihak pembela terhadap pertuduhan yang dipersoalkan adalah tidak berasas (lihat perenggan 11 & 12).

(2) Majistret telah tiba kepada penemuan fakta setelah meneliti degan terperinci keterangan pihak pendakwa. Tiada kesilapan dalam penemuan fakta yang tertuduh adalah 'occupier' berkaitan premis itu, di mana beliaulah yang bertanggungjawab, mengurus dan mengawal premis tersebut. Perkataan 'premises' termasuklah, antara lain, (a) apa-apa tanah, bangunan atau sebahagian daripada bangunan; dan (b) apa-apa tempat sama ada terbuka atau tertutup (lihat perenggan 29 & 30).

(3) Pihak pendakwa telah membuktikan bahawa pendatang wanita Indonesia yang ditemui di premis itu pada tarikh dan masa yang dipersoalkan, dalam kes ini, andaian di bawah s 55E(3) Akta tersebut timbul dan tertuduh sebagai penghuni hendaklah dianggap, kecuali sebaliknya dibuktikan, telah membenarkan pendatang haram untuk memasuki premis itu dan mempunyai pengetahuan bahawa beliau adalah seorang pendatang haram (lihat perenggan 31).

(4) Jikapun benar wanita Indonesia itu telah memasuki Malaysia dengan sah, kemasukan itu tertakluk kepada syarat bahawa beliau perlu bekerja sebagai orang gaji di Petaling Jaya tetapi beliau telah melanggar syarat itu dengan bekerja di premis tersebut. Pendatang Indonesia itu telah disabitkan di mahkamah majistret kerana satu kesalahan yang bertentangan dengan peraturan 39(d) Peraturan Imegresen 1963. Oleh itu, tidak diragui bahawa dari segi undang-undang dan fakta wanita Indonesia itu pada setiap masa material adalah seorang pendatang haram (lihat perenggan 32).

(5) Majistret telah mempertimbangkan kes pihak pembela dan tiba kepada keputusan yang betul dalam memutuskan bahawa tertuduh tidak mematahkan andaian di bawah s 55E(3) Akta tersebut atas imbangan kebarangkalian dan bahawa pihak pendakwa telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 38).

(6) Memandangkan tertuduh tiada sabitan sebelumnya dan hukuman tahanan tidak mandatori, dalam melaksanakan hukuman yang betul, majistret perlu menggunakan budi bicara dengan adil dengan merujuk kepada fakta dan keadaan setiap kes dan berdasarkan prinsip-prinsip kehakiman. Dalam ketiadaan keadaan yang teruk disebabkan oleh kesalahan yang melibatkan elemen jenayah yang serius, pesalah pertama kali pada amnya tidak dipenjarakan, dan tidak diberikan satu 'short, sharp shock' dalam bentuk hukuman tahanan lima hari. Berdasarkan fakta rayuan ini, tiada keterangan berhubung elemen serius jenayah untuk mewarankan pengenaan hukuman

tahanan. Satu tempoh penjara lima hari untuk kesalahan statutori dalam rayuan ini bukanlah demi kepentingan awam, kerana denda RM8,000 adalah memadai untuk melaksanakan keadilan (lihat perenggan 42 & 43).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3150–3191.

For cases on defective charge, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1010–1040.

For cases on employing illegal foreign worker generally, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3733–3735.

Cases referred to

Balachandran v Public Prosecutor [2005] 2 MLJ 30 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Maszenah bte Tambi v Pendakwa Raya (unreported) Melaka High Court Criminal Appeal No 2–41–2 of2005 (refd)
Ng Kook Kin v PP [1995] 2 MLJ 39 (refd)
PP v Leong Yoon Meow [1953] 19 MLJ xxxv (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
Tan Kok Siong @ Tan Koh Heng v Pendakwa Raya [1994] 3 AMR 52, 2775 (refd)

Legislation referred to

Criminal Procedure Code ss 152, 153
Immigration Act 1959/63 ss 40A, 55E(1), (2), (3), (5), (7)
Immigration Regulations 1963 reg 39(b)

Markhan Singh (Mohd Latip & Assoc) for the accused.
Abdul Rashid Daud for the prosecution.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellant-accused ('the accused') against the decision of the learned magistrate ('the magistrate') who had on 29 December 2004 convicted the accused of the offence under s 55E(1) of the Immigration Act 1959/63 (as amended in 2002) and imposed a sentence of five days imprisonment in addition to a fine of RM8,000, in default five months imprisonment.

[2] The custodial sentence had been stayed pending the disposal of this appeal. The fine has been paid.

THE CHARGE

[3] The charge preferred against the accused reads as follows:

> Bahawa kamu pada 22 Jun 2004 jam lebih kurang 1 petang bertempat di Gerai MPAG No 14, Perhentian Teksi Masjid Tanah, Melaka dalam daerah Alor Gajah di dalam Negeri Melaka sebagai 'PENDUDUK' (OCCUPIER) gerai tersebut didapati telah membenarkan seorang perempuan 'Imigran Haram' warganegara Indonesia iaitu:
>
> SUKIYAH SUWARTO (P-33 THN-INDONESIA)
>
> PASPORT NO AF 330168
>
> memasuki di dalam premis tersebut yang mana bertentangan dengan Seksyen 55E(1) Akta Imigresen 1959/63 (Pindaan 2002). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 55E(1) Akta Imigresen 1959/63 (Pindaan 2002) dan boleh dihukum di bawah Seksyen 55E(2) dalam Akta yang sama.

[My translation:

> That you on 22 June 2004 at about 1pm at MPAG stall No 14, Taxi Station Masjid Tanah, Melaka in the district of Alor Gajah in the state of Melaka, as an occupier of the said stall was found to have permitted a female Indonesian illegal immigrant, to wit, SUKIYAH SUWARTO (P-33 THN-INDONESIA) PASSPORT NO AF 330168 to enter the said premises in contravention of s 55E(1) Immigration Act 1959/63 (Amendment 2002) and that you have thereby committed an offence under s 55E(1) Immigration Act 1959/63 (Amendment 2002) punishable under s 55E(2) of the same Act.]

[4] Unless the context otherwise requires, a reference hereinafter to a section is a reference to that section in the Immigration Act 1959/63, as amended.

IS THE CHARGE DEFECTIVE?

[5] It was submitted by learned defence counsel Mr Markhan Singh that the charge is defective in that it has not specifically stated:

(1) the offence allegedly committed by the accused;

(2) that the accused knew that the Indonesian female was an illegal immigrant under s 55E(3); and

(3) that the accused had failed to take all the steps prescribed under s 55E(5).

[6] The response of the learned deputy public prosecutor En Abdul Rashid Daud is that the charge has complied with s 55E(1) and (2), seeking support in *Public Prosecutor v Syed Bakri* [1955] MLJ xvii and ss 152 and 153 of the Criminal Procedure Code ('CPC').

[7] In my judgment, the short answer to the challenge raised for the defence may be found by ascertaining whether the prosecution in drafting the charge has adhered as closely as possible to the wording of the statute constituting the offence with which the accused is charged (see eg Thomson J (later LP) in *Syed Bakri* and also in *Public*

A *Prosecutor v Leong Yoon Meow* [1953] 19 MLJ xxxv; *Ng Kook Kin v Public Prosecutor* [1995] 2 MLJ 39; and *Tan Kok Siong @ Tan Koh Heng v Pendakwa Raya* [1994] 3 AMR 52, 2775 (HC).)

[8] The drafting of a charge is governed by s 152 of the CPC which where relevant
B sets out the requirements as follows:

(1) It shall state the offence with which the accused is charged;

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only;

C (3) Otherwise, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged; and

(4) The law and the section thereof against which the offence is said to have been committed shall be mentioned in the charge.

D **[9]** Section 153 thereof, where relevant, requires the charge to contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

E

[10] With particular reference to the above charge, s 55E(1) and (2), where relevant, read:

55E. Occupier not to permit illegal immigrant to enter or remain at premises.

F (1) No occupier shall permit any illegal immigrant to enter… any premises.

(2) An occupier who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable…

[11] Upon a proper perusal of the charge in question, I am of the view that the
G above principles regulating the drafting of the charge under s 152 CPC and the particulars required under s 153 thereof have been adhered to by the prosecution.

[12] Section 55E(3) and (5), cited for the defence provide respectively for a rebuttable presumption and the measures which may be taken by the defence to rebut
H the presumption. It is fundamental that presumptions and their rebuttals belong to the domain of evidence as opposed to procedure. I therefore hold that the defence challenge to the charge is ill-founded.

FINDING OF FACTS

I **[13]** After a full trial, the finding of facts by the magistrate may be unfolded as follows.

[14] On 22 June 2004, by means of a departmental vehicle, immigration officer SP1 together with immigration officer SP2 and senior immigration officer SP3 went

to the taxi and bus station of Masjid Tanah in the district of Alor Gajah. Upon arrival at about 12 noon, they made observation on stalls No 9 and 14 there. At about 12.40pm, SP1 proceeded to stall No 9 where he arrested an Indonesian national.

[15] Subsequently, at 1pm, he proceeded to stall No 14, where he saw a female foreigner in the act of attempting to leave the stall. He approached the female foreigner, identified himself as an immigration officer and requested her to show her travel document, which she failed to do but admitted being a female Indonesian national. Immigration officer SP2 who then arrived was requested by SP1 to examine the female Indonesian. Meanwhile SP1 identified himself to a female Malay who is the stall owner ie, the accused. SP1 identified some photographs taken at the stall. Photograph B showed the place in stall No. 14 from which the female Indonesian had taken her handbag.

[16] SP1 requested the accused to produce her business licence and business registration which the accused did. SP1 then handed over these documents to SP2 for the purpose of preparing a search list which was duly served on the accused. The business licence is in the name of Zawiyah Ahmad Adam while the business registration bears the name of Zawiyah bte Ahmad Adam. Both these names refer to one and the same person ie, the accused. SP1 then requested SP2 to detain the accused who was brought to the immigration office in Melaka.

[17] SP1 and SP2 asked the female Indonesian to show her passport which she did, in her rented house. Her passport shows her name as Sukiyah Suwarto. She was given a temporary work permit pass to work as a domestic maid in Petaling Jaya.

[18] SP1's evidence was substantially corroborated by SP2 and SP3.

[19] Immigration officer SP4 who was directed by SP3 to investigate into this case vide Masjid Tanah Report 942/04 confirmed the correct address of stall No 14 as well as the identity of the accused and the female Indonesian named in the charge in addition to that of the accused.

[20] The female Indonesian has been found guilty and convicted of the offence of contravening a condition in her temporary work permit under reg 39(b) of the Immigration Regulations 1963 ('reg 39(b)). This was contained in her deposition in exh P13.

[21] On the above finding of facts, the magistrate found that the prosecution had established a prima facie case and defence was called.

[22] SD1, the accused, admitted in her defence that she was the sole proprietress of stall No 14 over which she has control and management. She also knew the female Indonesian named in the charge, Sukiyah Suwarto, by the name of Tini who was at the stall when the immigration team arrived.

[23] The accused's husband SD2 confirmed the accused as the owner of the stall and that Tini was arrested at the stall.

[24] SD3, the brother of the accused, testified that he was not at the stall on the date and time in question and so did not know what transpired there.

[25] At the close of the defence case, the magistrate found the charge had been proved beyond reasonable doubt and hence convicted the accused on the offence.

PRIMA FACIE CASE

[26] The defence contended that the prosecution has not established a prima facie case because the illegal immigrant was arrested outside and not at the stall, and that s 55E does not apply to, inter alia, stalls which are open to the public. Support was sought in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 to the effect that the magistrate has not given maximum evaluation to the evidence of the prosecution.

[27] For the prosecution, it was submitted that the prosecution has succeeded in proving the two elements viz occupier and permitting an illegal immigrant to enter the premises ie, the stall and so the presumption under s 55E(3) would arise, in order to establish a prima facie case.

[28] The answer to the above submissions is to be found by a careful reading of the appeal record, in particular the magistrate's grounds of decision. In my view, the magistrate has arrived at the finding of facts after subjecting the prosecution evidence to a maximum evaluation.

[29] The judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Looi Kow Chai & Anor* clarified that the duty of a judge sitting alone (in the context of the appeal before me, the magistrate) is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a prima facie case and that he must subject the prosecution evidence to maximum evaluation. This test was affirmed by the Federal Court in a judgment delivered by the same learned judge in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393. (See also *Balachandran v Public Prosecutor* [2005] 2 MLJ 30 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court).

[30] In the instant appeal, I am of the view that there is no error in the finding of fact that the accused was the 'occupier' in relation to the premises, being a person having charge, management or control of the premises. The word 'premises' includes, inter alia, (a) any land, building or part of a building; and (b) any place whether open or enclosed. Section 55E(7) has clearly set out the definition of the words 'occupier' and 'premises'.

[31] In relation to the second element, ie permitting an illegal immigrant to enter the premises, the prosecution has proved that the female Indonesian immigrant has

been found at the premises on the date and at the time in question, in which case, the presumption under s 55E(3) would arise and the accused being the occupier shall be presumed, unless the contrary is proved, to have permitted the illegal immigrant to enter the premises and had knowledge that she was an illegal immigrant, ie a person, other than a citizen, who contravenes, eg reg 39(b).

[32] While it is true that the female Indonesian has legally entered Malaysia, the entry was subject to the condition that she was to work as a domestic maid in Petaling Jaya but she has breached the condition by working at the stall in Alor Gajah. The Indonesian immigrant has been convicted in the Alor Gajah magistrate's court of an offence in contravention of reg 39(b) and was fined RM800 or one month's imprisonment in default. Hence, there can be no doubt that in law and in fact the female Indonesian was at the material time an illegal immigrant.

[33] In the circumstances, I am unable to sustain the defence contention that there was no prima facie case.

DEFENCE CASE

[34] The defence contended that the presumption under s 55E(3) has been rebutted by the defence as the illegal immigrant was not detained at the stall, adding that the accused did not employ any Indonesian worker.

[35] The prosecution submitted that the trial court's finding of fact is correct and so the prosecution's case stood unrebutted.

[36] I am of the view that the defence contention runs counter to the magistrate's finding of fact that the illegal immigrant was arrested at the stall, and that this finding is supported by ample evidence.

[37] The illegal immigrant's deposition, exh P13, is admissible under s 40A, without further proof, as prima facie evidence of the fact stated therein. It is clear that in the deposition, the illegal immigrant has confirmed that she was working at the stall, and her job was to cook, prepare drinks and attend to customers. She was paid RM15 daily by the accused.

[38] The magistrate has adequately considered the defence case and has come to a correct decision in holding that the accused has not rebutted the presumption under s 55E(3) on a balance of probabilities and that the prosecution has established its case beyond reasonable doubt.

SENTENCE

[39] The defence submitted that the sentence was manifestly excessive as custodial sentence is not mandatory.

[40] The prosecution drew my attention to *Maszenah bte Tambi v Pendakwa Raya* Melaka High Court Criminal Appeal No 2–41–2 of2005 in which the accused there was convicted of the same offence but at stall No 9 which is adjacent to stall No 14 and was sentenced to seven days imprisonment in addition to a fine of RM8,000. The same learned counsel appeared for the accused in the appeal there against conviction and sentence. At the hearing of the appeal, the accused abandoned the appeal against conviction but proceeded with the appeal against sentence, which was allowed in part as the custodial sentence was set aside while the fine was affirmed.

[41] The question before me is whether the custodial sentence is in the public interest. Section 55E(2) provides for a fine of not less than RM5,000 and not more than RM30,000 or to imprisonment for a term not exceeding 12 months or both. The fine of RM8,000 is within the maximum fine permissible under s 55E(2) and so being according to law is hereby affirmed.

[42] As the accused has no previous conviction and custodial sentence is not mandatory, in meting the proper sentence, the magistrate has to exercise the discretion judicially by reference to the facts and circumstances of each particular case and having due regard to established judicial principles. In the absence of aggravating circumstances resulting in offences which involve serious elements of criminality, first offenders are generally to be kept out of prison, rather than being given a 'short, sharp shock' in the form of a five-day custodial sentence.

[43] On the facts of this appeal, there was no evidence of serious elements of criminality to warrant the imposition of a custodial sentence. The offence is an illustration of human frailty. A term of five-day imprisonment for a statutory offence in the instant appeal would in my view not serve the public interest, as the RM8,000 fine is adequate to serve the ends of justice. I therefore allow this appeal in part and set aside the custodial sentence.

Appeal allowed in part.

Reported by Peter Ling